No. 5904

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM A. SHERMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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A.

STATEMENT OF CASE.

This is an appeal from an order of the United States District Court, for the Northern District of California, Southern Division, denying the motion of appellant to withdraw, recall and quash an alias execution. Said execution was levied upon the individual property of appellant.

The judgment in this action was rendered against William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad, for the sum of $300.00 and costs. The action arose out of three alleged violations of the Federal Safety Appliance Act in connection with the operation of the State Belt Railroad.

This case involves some of the same points as those involved in *Sherman, et al. v. United States,* No. 5839, now before this Honorable Court and the two cases should be considered together.

This action was commenced in the District Court by the filing therein of a complaint against William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad. Said complaint contained three causes of action, each for a specific violation of the Federal Safety Appliance Act alleged to arise by reason of hauling along the State Belt Railroad a car with a defective coupling device. (Trans. pages 1 to 6.) Summons was issued directed to William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad. (Trans. page 7.)

The return of the United States Marshal shows that he personally served said summons upon the Secretary of the Board of State Harbor Commissioners. (Trans. page 8.)

After denial of a motion to dismiss filed by the Board of State Harbor Commissioners of the State of California, appearing specially for the purpose of objecting to the jurisdiction of the Court, a default judgment was entered on June 28, 1927, against William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad. (Trans. pages 9 and 10.)

Appellant was succeeded in office as a member of the Board of State Harbor Commissioners of the State of California by Charles L. Tilden on or about February 15, 1927.

On May 2, 1929, an alias execution was issued in the above entitled action and on May 17, 1929, was levied upon the individual and personal property of appellant. (Trans. pages 12 to 16.)

Appellant thereafter, and on June 10, 1929, served and filed his motion to withdraw, recall and quash the said alias execution and the levy made pursuant thereto upon his individual and personal property on the grounds: First, that there was a variance between the alias execution and levy made thereunder and the judgment, in that the judgment was against defendants in their official capacity and the execution was levied against appellant in his individual capacity. Second, that the levy of said execution was without right and contrary to the provisions of law applicable to the levy of executions upon judgments against persons in their official capacity. Third, that the Federal Safety Appliance Act assessed a penalty against a common carrier only and not against any individual. That appellant was not a common carrier in his individual capacity and that said judgment could only have been rendered against and could only be enforced against defendants in their official capacity. Fourth, that said execution and levy made pursuant thereto were wrongfully, unlawfully and improperly issued and levied against and upon the property of appellant personally and individually. Fifth, that an execution cannot be issued against the State of Cali-

fornia and cannot be levied upon any property of the State of California. (Trans. pages 16 to 23, inclusive.) Said motion was thereafter duly made and denied. (Trans. pages 27 and 28.)

It affirmatively appears from the record that the complaint was filed and summons issued against defendants in their official capacity, constituting the Board of State Harbor Commissioners of the State of California; that summons was served upon the Secretary of said Board; that no individual service was made upon appellant or any other member of said Board; and that a default judgment was entered against defendants "constituting the Board of State Harbor Commissioners."

This judgment cannot be enforced against appellant. Firstly, the District Court did not acquire jurisdiction over appellant. If the judgment purports to bind him individually it is void. Secondly, a judgment against the members of the Board of State Harbor Commissioners in their official capacity cannot be enforced against appellant individually.

B.

SPECIFICATION OF ERRORS RELIED UPON.

The errors committed by the District Court and urged on this appeal are the following:

1. That the District Court erred in denying the motion of appellant, William A. Sherman, for an order withdrawing, recalling and quashing the alias execution issued in the above entitled action and levy

made pursuant thereto upon the personal property of appellant.

2. That the District Court erred in holding that a default judgment could be enforced against appellant in an action in which he was not served with summons and did not personally appear.

3. That the District Court erred in denying appellant's motion to withdraw, recall and quash the said alias execution and levy made pursuant thereto for the following reasons:

(a) That there was a variance between the said alias execution and levy made pursuant thereto and said judgment, in that the judgment was against defendants in their official capacity, whereas the levy was made upon the personal and individual property of appellant.

(b) That the complaint was filed against and judgment rendered against defendants constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad, and that the levy of execution upon the individual property of appellant to enforce said judgment is without right and contrary to the provisions of law applicable to the levy of execution upon judgments rendered against persons in their official capacity.

(c) That the judgment in this action is based upon alleged violation of the Federal Safety Appliance Act, which assesses a penalty against a common carrier only and that appellant is not a common carrier in his individual capacity. That the judgment herein could only have been rendered against and can only

be enforced against the Board of State Harbor Commissioners in their official capacity and not in their individual capacity.

(d) That appellant was never served with any process in this action and never appeared herein and that a default judgment, therefore, cannot be enforced against him personally.

4. That the District Court erred in holding that a judgment against defendants in their official capacity could be enforced against appellant individually and execution levied upon his individual and personal property.

All of the assignments of error are relied upon. Said assignments more specifically cover some of the errors above noted and appear on pages 32 to 34, inclusive, of the transcript.

C.

ARGUMENT.

A discussion of the points raised on this appeal logically falls into two main divisions. First, that the District Court did not acquire jurisdiction over William A. Sherman individually, and its judgment, if against him individually, was therefore null and void; and that execution issued thereon should have been quashed. Second, that the judgment does not purport to be, and is not, an individual judgment, but is a judgment against the Board of State Harbor Commissioners in their official capacity; that execu-

tion could not be levied thereunder upon the property of William A. Sherman individually and that such an execution levied on said property should have been quashed.

I.

JUDGMENT AGAINST APPELLANT INDIVIDUALLY IS VOID AND EXECUTION SHOULD HAVE BEEN QUASHED.

1. Summons Was Not Served Upon Appellant and Appellant Did Not Appear in the Action.

This action was commenced by the United States of America, plaintiff, against William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad. (Trans. page 1.) Summons directed to said William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad, defendants, was served on the 14th day of September, 1926, upon the Secretary of the Board of State Harbor Commissioners. The return of the United States Marshal appears in the transcript at page 8 and reads as follows:

> "United States Marshal's Office,
> Northern District of California.
>
> I hereby certify that I received the within writ on the 8th day of Sept., 1926, and personally served the same on the 14th day of Sept., 1926, upon Board of State Harbor Commissioners by delivering to, and leaving with James Byrne, Jr., who is the Secretary of the Board of State Harbor Commissioners said defendant named therein

personally, at the City and County of San Francisco, in said district a certified copy thereof, together with a copy of the complaint, attached thereto.

San Francisco, September 15th, 1926.

Fred L. Esola,
U. S. Marshal.
By Geo. H. Burnham,
Office Deputy.

(Endorsed) Filed September 15th, 1926."

No service was made on appellant individually.

No appearance was made by appellant individually.

No general appearance was made by the Board of State Harbor Commissioners.

A special appearance by the Board of State Harbor Commissioners through its attorney was made for the purpose of objecting to the jurisdiction of the Court and moving to dismiss the said action. The document filed was entitled notice of motion to dismiss. This document does not appear in the original transcript because it is not part of the judgment roll. However, in order that the Court may examine said document if it should desire, it will appear in a supplement to the transcript.

This notice of motion to dismiss cannot give the Court jurisdiction over appellant individually. It is a special appearance by the Board of State Harbor Commissioners and *not by defendant.* It is not a part of the judgment roll and is not an appearance by any person sufficient to give the Court jurisdiction. *Any jurisdiction of the Court in this action must be based upon service of summons.*

"Whether a judgment is void upon its face is to be determined by an inspection of the judgment roll."

Parsons v. Weis, 144 Cal. 410, 414.

The contents of the judgment roll are covered by Section 670 of the Code of Civil Procedure of California. In this case no answer was filed and Subdivision 1 of said Section 670 is therefore applicable and reads as follows:

"1. In case the complaint is not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; and in case the service so made is by publication, the affidavit for publication of summons, and the order directing the publication of summons;"

The notice of motion to dismiss was not an appearance.

"A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him."

Davenport v. Superior Court, 183 Cal. 506, 509.

Code of Civil Procedure of California, Sec. 1014.

Section 1014 of the Code of Civil Procedure was intended to settle all disputes upon the subject of what constitutes an appearance.

Salmonson v. Streiffer, 13 Cal. App. 395, 397.

There was then, no appearance in the action by anyone, and particularly no appearance by William A. Sherman, individually.

After denial of said motion to dismiss, a default judgment was entered. This judgment shows on its face that no plea, answer or demurrer was filed after denial of motion to dismiss and that the judgment was rendered after default. (Trans. p. 9.)

The entry of default endorsed on the complaint appears in the transcript, page 6 and further shows that default was based on an alleged service and failure to appear.

The only record of service is that above mentioned on the Secretary of the Board of State Harbor Commissioners.

It therefore conclusively appears from the judgment roll that appellant was not served with process and did not appear in the action.

2. A Personal Judgment Against a Defendant Who Has Not Been Served With Process and Has Not Appeared Is Null and Void.

We are *not* concerned here with the question of service upon the Secretary of the Board of State Harbor Commissioners as being an effective service upon said Board. Appellant in this case seeks to set aside an execution levied against *him individually* upon the theory that the judgment is void against *him individually*.

Without question, a judgment rendered without service of process upon, or appearance by, appellant is absolutely void as against him.

> "A personal judgment rendered against a defendant without service of process upon him, or

other sufficient legal notice to him, is without jurisdiction and void, * * *"

33 *Cor. Jur.*, 1082.

"It must be taken at the outset as settled that no valid judgment *in personam* can be rendered against a defendant without personal service upon him in a court of competent jurisdiction, or waiver of summons, and voluntary appearance therein. Pennoyer v. Neff, 95 U. S. 715, 25 L. Ed. 565; Caledonian Coal Co. v. Baker (New Mexico ex rel. Caledonian Coal Co. v. Baker), 196 U. S. 432, 444, 49 L. Ed. 540, 545, 25 Sup. Ct. Rep. 375, and cases cited."

Clark v. Wells, 203 U. S. 164, 171 · 51 L. Ed. 138, 141.

3. Execution Issued Upon a Void Judgment Should Be Quashed.

A judgment which is void upon its face may be attacked directly or collaterally at any time.

"A judgment rendered by the Superior Court is always presumed to have been within its jurisdiction (*In re Eichhoff*, 101 Cal. 600); but if it affirmatively appears upon the face of the judgment record that the Court *did not have jurisdiction of the defendant, its judgment is at all times open to either a direct or a collateral attack.*" (Italics ours.)

Parsons v. Weis, 144 Cal. 410, 415.

"It is, of course, well settled that where the judgment is void upon its face, it may be attacked collaterally. In other words, if an inspection of the judgment roll itself discloses that the judgment is, for any reason, void, the judgment may be so declared and as having no force or effect on a collateral as well as on a direct attack thereon. Of course the rule is different where the judgment is merely voidable. These

propositions are elementary and authorities supporting the statement thereof need not be cited."

McPhail v. Nunes, 38 Cal. App. 557, 562.

"It is a familiar and universal rule that a judgment rendered by a Court having no jurisdiction of the parties or subject matter is void and a mere nullity, *and will be so treated whenever and for whatever purpose it is sought to be used or relied on as a valid judgment."* (Italics ours.)

Black on Judgments, 2nd Ed. Sec. 218.

Courts afford relief against void judgments either by setting them aside or staying or quashing execution.

"It is conceded by all of the authorities that a court will interpose to *stay the execution of a void judgment.*

A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant.

It is said a court whose process is abused by an attempt to enforce a void judgment will interfere, for its own dignity, and for the protection of its officers, to arrest further action. (Mills v. Dickson, 6 Rich. 487.)

The most effectual method of doing this is by exterpating the judgment itself,—by removing a form which is without substance." (Italics ours.)

People v. Greene, 74 Cal. 400, 405.

" 'A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worth-

> less. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers.' (1 Freeman on Judgments, Sec. 117.) 'Each court has such general control of its process as enables it to act for the prevention of all abuse thereof. Hence it may, to prevent the annoyance which might be occasioned by the attempted execution of a void judgment, *either stay or arrest the process.*' (Freeman on Executions, Sec. 32.)" (Italics ours.)
>
> *Kreiss v. Hotaling,* 96 Cal. 617, 622;
>
> *A. B. Farquar Co. v. De Haven,* 75 S. E. 65; 40 L. R. A. (N. S.) 956.

Where a writ of execution is utterly void as lacking both statutory and decretal authority for its issuance, it is the duty of the Court on its own motion, and upon the essential invalidity of the writ being brought to its attention from any source, to recall and quash it.

Montgomery v. Meyerstein, 195 Cal. 37.

The United States District Court did not acquire jurisdiction of appellant. The judgment rendered against him was, therefore, void and the District Court erred in denying appellant's motion to quash and recall the execution issued against him personally upon such void judgment.

II.

THE JUDGMENT WAS AGAINST DEFENDANTS IN THEIR OFFICIAL CAPACITY. EXECUTION ISSUED AGAINST AND LEVIED UPON PERSONAL PROPERTY OF APPELLANT INDIVIDUALLY SHOULD HAVE BEEN QUASHED.

This action was brought and judgment rendered against defendants in their official capacity, to-wit, against the Board of State Harbor Commissioners of the State of California.

In making this statement, we are not overlooking the decision of this Honorable Court in *McCallum v. United States,* 298 Fed. 373. As set forth in appellants' brief in the companion case of *William A. Sherman et al. v. United States,* No. 5839, now before this Court, we believe and earnestly submit that *McCallum v. United States,* supra, should be overruled or modified. However, this action involves a default judgment and we must look to the record only to ascertain plaintiff's rights and the capacity in which defendants were sued and in which judgment was rendered against them. This exact point was not involved in *McCallum v. United States,* supra.

Appellant submits that upon the clear and unequivocal language of the complaint and judgment and upon well recognized rules of construction, the said judgment is and must be construed as a judgment against defendants in their official capacity, and that execution levied upon appellant's property individually under such judgment should be quashed. We will discuss these points in order:

1. Language of Complaint and Judgment Establishes Official and Representative Capacity of Defendants.

The caption of the complaint, the greeting of the summons and the caption and body of the judgment refer to and describe defendants as follows: "William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California operating the State Belt Railroad."

The language "constituting the Board of State Harbor Commissioners" is clear and unequivocal. These words are not mere adjectives of description. They constitute a formal statement designating the capacity in which defendants were sued.

2. Entire Record Shows Judgment Was Against Defendants in Their Official and Representative Capacity.

We believe the language of the judgment in this case is clear and unequivocal and requires no construction. However, if construction is necessary, the following well established rules of interpretation and facts from the record also conclusively show that the action and judgment are against defendants in their official and representative capacity.

(a) The Word "As" Is Not Necessary to Show Representative Capacity of Party.

While the word "as" appearing between the name and official title of a party has weight in determining the capacity in which the party is suing or being sued, the presence or absence of this word is not controlling. It need not be used in the caption of the complaint if

the body thereof shows suit is in a representative capacity.

Beers v. Shannon, 73 N. Y. 292;
Gatti-McQuade Co. v. Flynn, 140 N. Y. S. 135;
Lucas v. Pittman, 94 Ala. 616; 10 So. 605;
Holloway v. Calvin, 203 Ala. 663; 84 So. 737.

(b) In Cases of Doubt As To Capacity of Party, the Entire Record Should Be Considered.

Cases involving a doubt as to capacity of plaintiff or defendant are usually of either one or two classes—those involving a right accruing to, or existing against, a party in a representative character which was improperly expressed in the title of the action, or cases where there was an unnecessary addition of a representative title to the name of the party when in fact, the cause of action was upon an individual right or obligation.

> "In these cases it has been held that the title and pleadings may be considered together to ascertain the true nature of the action, and the action will be treated as an individual or representative one, as disclosed upon an inspection of the whole record. Stilwell v. Carpenter, 2 Abb. N. C. 238, 62 N. Y. 639; Beers v. Shannon, 73 N. Y. 292; Litchfield v. Flint, 104 N. Y. 543; 11 N. E. 58; Jennings v. Wright, 54 Ga. 537; Waldsmith's Heirs v. Waldsmith's Adm'rs., 2 Ohio, 156; Pennock v. Gilleland, 1 Pittsb. Rep. 37, Fed. Cas. No. 10,942."
>
> *First Nat. Bank of Amsterdam v. Shuler,* 47 N. E. (N. Y.) 262, 265.

In determining who are parties, the entire record should be considered.

Hamilton v. Speck, 144 S. E. (Ga.) 204.

"The character in which one is made a party to a suit must be determined from the allegations of the pleading, and not from its title alone. And where there is a wrong description or no description in the title, the error will be deemed merely formal. A substantial description is sufficient. And where the allegations of the complaint indicate with reasonable certainty that a plaintiff sues, or a defendant is sued, in a representative capacity, although there be no express or specific averment thereof, this is sufficient to fix the character of the suit. Where it is doubtful in what capacity a party sues or is sued, reference may be had to the entire complaint to determine the question; and reference may also be had to the pleadings as a whole, or to the entire record."

47 *Cor. Jur.* 176.

(c) The Entire Record Shows Official and Representative Capacity of Defendants.

The complaint was filed against, and summons issued, directed to William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California, operating the State Belt Railroad. (Trans. pp. 1 to 8 incl.)

The idea of the defendant being an entity rather than a group of individuals is further established by the following items in the complaint:

The use of the word "the" immediately preceding William A. Sherman, etc., in the opening paragraph of the complaint. (Trans. p. 1.)

Each cause of action commences with these words:

"Plaintiff alleges that *defendant* is and was during the times herein mentioned, a common carrier * * *." (Italics ours.)

Each cause of action contained an allegation that on a particular day "*defendant* hauled said car * * *." (Italics ours.)

In the prayer of the complaint, judgment is prayed against "said *defendant.*" (Italics ours.)

In other words, the complaint clearly was drawn upon the theory of the defendant being an entity rather than a group of individuals.

Summons was served upon the Board of State Harbor Commissioners by serving the Secretary of said Board and the return of the United States Marshall was made accordingly. (Trans. p. 8.)

The language of the judgment is "do have and recover of and from William A. Sherman, M. F. Cochrane and J. B. Sanford, constituting the Board of State Harbor Commissioners of the State of California operating the State Belt Railroad, defendants." This language again shows the official capacity, and representative character of defendants.

Nowhere in the complaint is there any allegation indicating a claim against a group of defendants as individuals. The entire theory of the complaint as indicated by its clear and unequivocal language, is against an entity, to-wit, a Board.

(d) The Complaint Does Not and Could Not State a Cause of Action Against Defendants as Individuals.

In urging the argument that the complaint does not state facts sufficient to constitute a cause of action against appellant as an individual defendant we are not seeking to collaterally attack the judgment, but

merely to show that the action and judgment were brought and rendered against defendants in their *official capacity and must be so construed.*

No allegation is contained in the complaint showing *any individual participation* by any defendant in any violation of the Federal Safety Appliance Act. To state a cause of action against defendants individually, plaintiff must show such individual connection. The principle of *respondeat superior* does not apply to a public official in connection with torts of subordinate officers.

These points are fully briefed in the companion case of *William A. Sherman, et al. v. United States of America,* No. 5839, mentioned in the opening of this brief. As we understand that the two cases will be argued together, we refer to appellants' brief in said case (No. 5839), and particularly to pages 13 to 19 inclusive thereof for a complete discussion of this question.

A cause of action could not have been stated against defendants individually for a violation of the provisions of the Federal Safety Appliance Act because defendants in their individual capacity are not a common carrier, and the Federal Safety Appliance Act authorizes the imposition of a penalty against a common carrier only and not against any individual or officer of a common carrier.

This point is also fully briefed in the case of *William A. Sherman, et al. v. United States of America,* No. 5839, and we refer to appellants' brief in said case, and particularly to pages 20 to 26 inclusive thereof for a complete discussion of this question.

The record, construed under well established principles, conclusively establishes the official and representative capacity in which defendants were sued, and in which judgment was rendered against them.

3. Execution Cannot Be Issued Against Appellant Individually Upon Judgment Rendered Against Him in His Official Capacity and Execution So Levied Should Have Been Quashed.

The principles of law are clearly established that a judgment rendered against a defendant in an official or representative capacity cannot be enforced against him personally, and that an execution issued or levied against him personally should be quashed.

23 *Corpus Juris* p. 312;

Reid v. Stegman, 15 Abbott New Cases (N. Y.) 422;

Tompkins Co. v. Smith, 11 Wendell (N. Y.) 181;

In re McTeveys Estate, 158 N. Y. Supp. 136;

Welsbach Company v. The State of California, et al. etc. (1929) Vol. 77 Cal. Dec. 373;

Hartford Fire Ins. Co. v. Jordan, 168 Cal. 276.

An execution levied upon property which was not subject to the lien thereof should be recalled and quashed on motion.

Easter v. Holcomb, 221 Ill. App. 485;

In re McTeveys Estate, 158 N. Y. Supp. 136.

A writ of execution that is wrongfully, unlawfully, improperly or erroneously issued, or that varies from the judgment, or a levy which is erroneously made

pursuant to execution should be withdrawn, recalled and quashed on motion duly made for that purpose.

Montgomery v. Meyerstein, 195 Cal. 37;
Creditors' Adjustment Co. v. Newman, 185 Cal. 509;
Buell v. Buell, 92 Cal. 393;
Dawes v. Dawes, 43 Atl. (N. J.) 984.

D.

CONCLUSION.

In conclusion, we submit that the execution must be quashed upon any theory.

Appellant was not personally served with process, did not appear in the action, and the United States District Court accordingly acquired no jurisdiction over him.

If the judgment purports to be against appellant individually, it is void for lack of jurisdiction and execution issued and levied upon the property of appellant individually, must be quashed.

If the judgment purports to be one against defendants in their representative and official capacity, and to be valid at all it must be so construed, then it cannot be enforced against defendant and appellant individually, and an execution issued and levied upon the property of appellant individually must be quashed.

The principles of law involved are too clearly established to permit of serious question, and it is, therefore, respectfully submitted that the order of the

District Court denying appellant's motion to quash, recall and set aside the said execution and levy made thereunder, is erroneous and must be reversed.

Dated, San Francisco,
September 28, 1929.

Respectfully submitted,
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